90-614

No. _____

In The

Supreme Court of the United States

October Term, 1990

DANIEL J. PROBASCO,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

LOUIS B. BRUNO
Counsel of Record

EARL S. WYLDER
BRUNO, BRUNO & COLIN, P.C.
One Civic Center Plaza
1560 Broadway, Suite 1099
Denver, CO 80202-5143
Telephone: (303) 831-1099

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTIONS PRESENTED FOR REVIEW

A. Was a deputy sheriff in "custody" in the following circumstances:

1. After 1:00 a.m., a suspect was fatally shot following a struggle with the deputy while he was attempting to handcuff the suspect;

2. There were no witnesses to the struggle and shooting;

3. When peace officers arrived, the deputy was leaning over the body and no one else was present;

4. A police sergeant, who was in charge at the scene, stated that the deputy was "overwhelmed with what was going on";

5. The sergeant testified that the deputy was not free to leave because he "could possibly be a suspect at that time";

6. Two police officers and a deputy surrounded the possible suspect while he was sitting in his car near the scene;

7. A state supreme court held that the deputy was interrogated while he was sitting in his car?

B. In determining whether a reasonable deputy sheriff is in custody or deprived of his freedom in a significant way, should a state supreme court afford him less rights than an ordinary citizen?

II. LIST OF PARTIES

The names of all parties appear in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

OPINION BELOW

On Monday, September 10, 1990, the Supreme Court of the State of Colorado rendered an opinion in Case Number 90 SA 84, entitled *The People of the State of Colorado, Plaintiff-Appellant v. Daniel Jay Probasco, Defendant-Appellee.* App. A

JURISDICTION

The date of the judgment and opinion sought to be reviewed is September 10, 1990. The statutory provision which confers jurisdiction on this Court to review the judgment and opinion is 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1 provides, in part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves a prosecution of a Deputy Sheriff for criminally negligent homicide which allegedly took

place on July 15, 1989, during an altercation following an attempted arrest in Fort Morgan, Colorado.

On February 12, 1990, the Motion of the Defendant in Limine to Prohibit the People From Attempting to Introduce Into Evidence in the Case in Chief Certain Statements Made By the Defendant was filed. App. B

On February 20, 1990, a hearing was held on the Motion. Three officers with the Fort Morgan Police Department testified.

The evidence showed that at about 1:24 a.m., on July 15, 1989, dispatch aired that the Fort Morgan Police Department had just received a 911 call over the phone, of shots fired, and gave an address in Fort Morgan, Colorado. When the police officers arrived, they found Deputy Probasco of the Morgan County Sheriff's Department leaning over the body of a man. No one else was present when they arrived. There was a lot of blood on the head and face of the party on the ground.

Deputy Probasco twice stated "I'm not going to say anything." He was instructed to back away from the wounded party. He appeared to be scared. He seemed overwhelmed and distraught. Sergeant Ringo, of the Fort Morgan Police Department, was the highest ranking officer at the scene and was in charge of the investigation. He instructed Officer Goebel of the Fort Morgan Police Department to go with Probasco to the patrol car and stay with him. Sergeant Ringo stated that he was not free to leave because he "could possibly be a suspect at that time" and his sheriff uniform and service revolver could be material evidence. After Officer Goebel and Deputy Wood accompanied Probasco to his patrol car and were

waiting there with him, Officer Smith arrived. Without having advised Probasco of his *Miranda* rights, Officer Smith asked him "how his stick and his radio wound up there on the porch." Deputy Probasco responded in detail to Officer Smith the entire circumstances surrounding the shooting incident while he was seated in his patrol car in the presence of two police officers and one deputy sheriff.

At the end of the hearing, the Court granted the Motion. The Court found that the statements should be suppressed because the Defendant was subjected to custodial interrogation without being advised of his *Miranda* rights. In its Order, the Court referred to *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed. 2d 297 (1980). App. C.

On February 22, 1990, the People filed a Notice of Appeal. Colorado Appellate Rule 4.1, provides that the State may file an interlocutory appeal in the Colorado Supreme Court from a ruling of a district court granting a motion to suppress a confession or admission made in advance of trial.

On September 10, 1990, the Supreme Court of Colorado rendered an opinion in which it reversed the Order of Suppression. The majority acknowledged that the evidentiary state of the record supported the finding of the trial court that the Defendant was subjected to interrogation, but rejected the determination that this was a custodial setting. The opinion did not discuss *Innis*. There was a dissenting opinion joined by another justice.

We emphasize that this is a final Order that cannot be reviewed again by the state courts in Colorado.

The federal questions sought to be reviewed were timely and properly raised in the Motion of the Defendant in Limine. Therein, we stated as follows:

> "All the statements were made prior to any Miranda advisements and constitute a violation of his right against self-incrimination in that the same were made pursuant to a 'custodial interrogation' as the term is defined by *People v. Trujillo*, XIV *Brief Times Reporter* 121 (Colo. January 29, 1990). [785 P.2d 1290 (Colo. 1990)].
>
> That if this Motion is not granted, the Defendant will be denied the following constitutional rights:
>
> a. The right not to be compelled to testify against himself in a criminal case as encompassed in the due process clause of the Fourteenth Amendment to the United States Constitution, and Article II, §18 of the Colorado Constitution, relating to self-incrimination."

In the Answer Brief of the Defendant-Appellee, which was filed on March 26, 1990, in the Supreme Court of Colorado, we stated as follows:

> "I. *WAS DEPUTY DANIEL J. PROBASCO IN 'CUSTODY' WHEN FOLLOWING A SHOOTING INVOLVING TWO PERSONS HE WAS THE ONLY SURVIVOR, AND SERGEANT BRUCE RINGO, WHO WAS IN CHARGE AT THE SCENE, TOLD OFFICER JOHN GOEBEL TO STAY WITH PROBASCO, AND RINGO TESTIFIED THAT PROBASCO WAS NOT FREE TO LEAVE.?"* Ans. Brf. p.1

The way the trial court passed on this issue is that it granted the Motion in Limine. The Supreme Court of Colorado reversed and stated as follows:

> "A reasonable civilian sitting in that police car might have believed that he was in custody, but the reasonable police officer, while on duty, sitting in his police car with fellow officers that were also his friends, would not be likely to believe that his freedom of action was limited in a significant way.
>
> " . . .
>
> "We conclude, therefore, that this was not a custodial setting, and that Probasco's statements should not have been suppressed." Op. pp.13, 14.

We note that the first sentence quoted above is a pivotal sentence. As written, it reads nicely and helps to support the conclusion reached. However, it simply is not correct and is contrary to the record. Probasco was not a "police officer." He was a deputy sheriff. Two of the officers at the car were Fort Morgan police officers, the other man was a deputy sheriff. In regard to "friends" there was no evidence that the officers were his friends. One stated that he was "a close acquaintance."

REASONS FOR GRANTING THE WRIT

The special reasons for granting the Petition for Writ of Certiorari are that the Colorado Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with

applicable decisions of this Court. In short, the issue of what constitutes "custody" when the suspect is a peace officer has not been decided by this Court. On the other hand, the Colorado Supreme Court has decided this issue in a way that conflicts with the objective reasonable-man test which has been set forth in the applicable decisions of this Court. The Colorado Supreme Court has carved out an exception for peace officers and, in effect, applied a subjective test.

In *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Court stated as follows:

> A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.
>
> Cf. *Beckwith v. United States*, 425 U.S. 341, 346-347, 96 S.Ct. 1612, 1616-1617, 48 L.Ed.2d 1 (1976).
>
> . . .
>
> an objective, reasonable-man test is appropriate because, unlike a subjective test, it "is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question").

The Colorado Supreme Court did not follow *Berkemer* and *Beckwith*. Instead it carved out a subjective test for peace officers.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BRUNO, BRUNO & COLIN, P.C.

LOUIS B. BRUNO
Counsel of Record

EARL S. WYLDER
Attorneys for Petitioner
One Civic Center Plaza
1560 Broadway, Suite 10099
Denver, CO 80202-5143
Telephone: (303) 831-1099

APPENDIX A

SUPREME COURT OF COLORADO NO. 90SA84	September 10, 1990
THE PEOPLE OF THE STATE OF COLORADO	Plaintiff-Appellant,
v.	
DANIEL JAY PROBASCO,	Defendant-Appellee.

Interlocutory Appeal from the District Court,
Logan County Honorable James R. Leh, Judge

EN BANC — ORDER REVERSED AND CASE REMANDED WITH DIRECTIONS

Jon M. Baily, District Attorney, Thirteenth Judicial District Sterling, Colorado
Attorney for Plaintiff-Appellant

Bruno, Bruno & Colin, P.C.
Louis B. Bruno
Earl S. Wylder
Lakewood, Colorado
Attorneys for Defendant-Appellee

JUSTICE ERICKSON delivered the Opinion of the Court. JUSTICE QUINN dissents and JUSTICE LOHR joins in the dissent.

In this interlocutory appeal, pursuant to C.A.R. 4.1, the prosecution seeks to overturn an order of the district court suppressing certain statements made by the defendant, Daniel J. Probasco. The statements were made by the defendant, a deputy sheriff, to fellow police officers while he was seated in his police vehicle. The district

court held that the statements were the product of interrogative questioning in a custodial setting, without the benefit of *Miranda*[1] warnings, and therefore violated the defendant's constitutional rights. We reverse the suppression order and remand to the trial court for further proceedings consistent with this opinion.

I.

On July 15, 1989, at 1:16 a.m., the defendant, Morgan County Deputy Sheriff Daniel Probasco, radioed that he was making a traffic stop. A short time later, he requested assistance, and officers from both Fort Morgan and Morgan County responded.

Upon arriving at the scene, the officers found Probasco's car, with its emergency lights on and engine running, but could not locate Officer Probasco. Within a few minutes, the police dispatcher relayed a 911 call that shorts were fired within a short distance from Probasco's patrol car. The officers went to that location and found Probasco kneeling over the body of Daniel E. Smith. Smith's head was bleeding profusely, and he had been shot. Police Sergeant Bruce Ringo, who was the first to take charge of the investigation, asked Probasco to step back and began efforts to resuscitate Smith. According to Officer Ringo, the defendant was shaken up and was "overwhelmed with what was going on." Ringo asked another officer to accompany the defendant back to the defendant's patrol car and to wait with him there. Probasco and two other officers went to Probasco's patrol

---

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

car. A third officer, Leon Smith, joined the defendant and the two other officers a short time later.

At the suppression hearing, Officer Smith testified that he noticed Probasco's radio and baton on the porch of a nearby house. Smith asked Probasco "how his stick and his radio wound up on the porch?" Smith said that he asked the question just "to start up a conversation" and that he had joined Probasco and the other officers to "make sure that Officer Goebel and Dan Probasco were ok." It was then that the defendant replied "[l]et me tell you what happened." Probasco stated that he had stopped the driver, and that while talking to him, the driver shoved him and ran away. Probasco chased the driver for a block or so, found him under some bushes hiding, drew out his pistol and ordered the man to remain where he was. Probasco stated that Smith began to get up, "struck the end of his weapon and the weapon went off on him." Smith later died as a result of being shot in the head.

The defendant was not placed under arrest, and was not given the *Miranda* warning before or after he made the statement. Probasco was subsequently charged with criminally negligent homicide.[2]

The defendant, relying on *Miranda v. Arizona*, 384 U.S. 436 (1966), moved to suppress the statements. Following a hearing, the district court granted the defendant's motion and ordered that the statements be suppressed.

---

[2] § 18-3-105, 8B C.R.S. (1986).

II.

Miranda v. Arizona requires a four-fold warning prior to custodial interrogation to ensure that the accused is advised of his right to counsel and of his right not to incriminate himself. *Miranda*, 384 U.S. at 478-79. Before *Miranda* is applicable, however, there must be both interrogation by the police, and "custody." *Id.* The issue in *People v. Trujillo*, 784 P.2d 788 (Colo. 1990), was when does police questioning become custodial interrogation. Under the facts in *Trujillo*, questioning by a police officer in a police interview room amounted to custodial interrogation and required *Miranda* warnings. Whether Probasco's answers to the question asked by a fellow officer were the product of custodial interrogation is the issue in this case.

III.

The prosecution claims both that the question asked Probasco did not amount to interrogation, and that Probasco was not in custody at the time he made his statement. In *Trujillo*, we stated that interrogation referred "not only to express questioning by a police officer, but also to any words or actions on the part of the officer that the officer 'should know are reasonably likely to elicit an incriminating response from the suspect.' " *Trujillo*, 784 P.2d at 790 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). The district court found that Officer Smith's question regarding "how his [the defendant's] stick and radio wound up on the porch" constituted interrogation under the *Innis* and *Trujillo* standard. Though such a question, from one officer to another, is not of the adversarial nature normally associated with police interrogation,

Officer Smith reasonably should have expected the defendant to answer with some kind of an explanation – which is precisely what happened. Any explanation of the events leading up to the shooting could be potentially incriminating, and would therefore be the very kind of statement that *Miranda* was intended to protect. Here, the district court correctly found that the question amounted to interrogation. The more difficult issue is whether the questioning occurred while Probasco was in custody.

IV.

Custody includes, but is not limited to, the situation in which the defendant is actually placed under arrest. It is conceded that Officer Probasco was not under arrest at the time he made the statement to Officer Smith. Interrogation is also custodial, however, whenever the defendant is "deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. In *Trujillo*, we stated that a court must "consider the totality of the circumstances surrounding the interrogation" in order to determine whether a "reasonable person in the suspect's position would consider himself deprived of his freedom of action in a significant way . . . . " *Trujillo*, 784 P.2d at 791. Factors include:

> The time, place and purpose of the encounter; the persons present during the interrogation; the words spoken by the officer to the defendant; the officer's tone of voice and general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; the officer's

> response to any questions asked by the defendant; whether directions were given to the defendant during the interrogation; and the defendant's verbal or nonverbal response to such directions.

People v. Thiret, 685 P.2d 193, 203 (Colo. 1984). As we stated in *Trujillo*, our role is to examine the record and determine whether the district court applied the correct legal standard and, if so, whether the ruling is "adequately supported by competent evidence." *Trujillo*, 784 P.2d at 792.

In ruling that the interrogation of Probasco was custodial, the district court found that when viewing the totality of the circumstances, any reasonable person would have considered "himself deprived of his freedom of action in a significant way." To reach that conclusion, the court relied on the time, place, and purpose of the encounter, and the subjective understanding of the defendant.

> [T]he defendant was first contacted over the body of the victim under circumstances implicating him in the death of the victim. The officers involved had received information through the dispatcher that there had been a problem on contact, and certainly the officers responding to the location of the defendant and the victim fully understood that it was something more than a mere traffic problem, ...

The court also focused on the defendant's statement that he did not want to say anything immediately after the other officers arrived and found the defendant leaning over the body. The court took this statement to mean that the defendant subjectively knew that he was not free to leave. While the defendant's verbal and nonverbal

responses are a factor to be taken into consideration, we believe the district court was too limited in its examination.

Miranda's protections seek to guard against involuntary incriminating statements made under the "inherently compelling pressures" present in custodial interrogations that "work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984) (quoting *Miranda*, 384 U.S. at 467). In *Murphy*, the Court said that "[w]e have consistently held, however, that this extraordinary safeguard does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Murphy* 465 U.S. at 430 (citations omitted). The Court reaffirmed *Miranda*'s limited application last term in *Illinois v. Perkins*, ___ U.S. ___, 58 U.S.L.W. 4737 (U.S. June 4, 1990). In *Perkins*, the Court stated that "Miranda forbids coercion," and acknowledged that "confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without compelling influences is, of course, admissible in evidence." *Id.* at 4739 (citations omitted). *Perkins* held that *Miranda* warnings were not required when an undercover police officer was sent into a cell to ask a prisoner questions designed to elicit incriminating statements concerning a separate crime, even though the defendant was clearly in custody and the questions fit the general definition of interrogation. "Coercion is determined from the perspective of the suspect, . . . [and] [w]hen a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking." *Id.* (citations removed).

Although *Perkins* is distinguishable from the present case, the fact that Probasco was a police officer cannot be ignored. In this case, rather than fellow cellmates as in *Perkins*, Probasco was surrounded by his fellow police officers, men that he worked with daily and that were there, according to Officer Smith, trying to calm him down and tell him that everything would be all right. There is nothing in the record to indicate that any of the officers were trying to coerce an incriminating statement from Probasco.

We do not challenge the well-founded rule that once a suspect is confronted with custodial interrogation, his occupation has no bearing on whether he is entitled to *Miranda* warnings.[3] "The requirement of *Miranda* warnings is not contingent upon a defendant's actual or presumed knowledge of his rights or on his status but, rather, must be honored in all instances of custodial interrogation." *United States v. Longbehn*, 850 F.2d 450 (8th Cir. 1988). But that is not the issue in this case. Rather, the issue is whether Probasco was in custody, and Probasco's status as a police officer is relevant to that question.

The test for determining whether a person is in a custodial setting is "whether a reasonable person *in the suspect's position* would consider himself deprived of his freedom in a significant way." *People v. Milhollin*, 751 P.2d 43, 49 (Colo. 1988) (emphasis added). The objective question here is whether a reasonable police officer, in

---

[3] The fact that Probasco was a police officer, and therefore presumed to be familiar with his constitutional rights, would be irrelevant.

Probasco's position, would consider himself to be deprived of his freedom in a significant way.

A court "must examine the facts and circumstances surrounding the situation to determine whether the *Miranda* protections apply in any given situation," and that determination "must be made on a case by case basis." *People v. Wallace*, 724 P.2d 670, 673 (Colo. 1986). The fact that Probasco was a police officer makes this situation unique.

The reason for the original contact between Probasco and his fellow officers was, quite simply, because the defendant himself was an on-duty police officer that had called for assistance. There is nothing in the record to suggest that the responding officers had any suspicion that Probasco had committed any wrong. The trial court relied on the fact that Probasco was first found standing over the body. Nothing in the record supports a claim that Probasco reasonably believed that he was suspected of wrongdoing. *See New Jersey v. Bode*, 108 N.J. Super. 363, 261 A.2d 396 (1970) (police officer called aside by police chief to discuss officer's theft of merchandise not in custody).

The trial court also relied on the testimony that Probasco was in a state of shock, and did not want to say anything, "at least suggest[ing] that he had some consciousness perhaps of a custodial type arrangement and that he was not free to leave." While such a reaction may be relevant, a suggestion alone is not enough to find that the defendant was in custody.

The trial court found that "[i]t's apparent from the Sergeant's [Officer Ringo's] testimony that subjectively, in

the police, law enforcement's mind the defendant was not free to go anywhere." We held in *People v. Wallace*, 724 P.2d at 673, that "the police officer's subjective state of mind is not an appropriate standard for determining whether an individual has been deprived of his freedom of movement in any significant way." In *People v. Black*, 698 P.2d 766 (Colo. 1986), we found that "testimony by a police officer that he would not have allowed the defendant to leave the scene of the accident has no bearing on the custody issue where the officer does not communicate his intention to the suspect." The trial court here incorrectly relied on Officer Ringo's testimony that Probasco was not free to leave. Officer Ringo testified that Probasco was not free to leave for a variety of reasons, including that he might be a witness, that his uniform and weapon might be evidence, and that he "*could* possibly be a suspect." Therefore, Officer Ringo's testimony does not establish Probasco's claim that he was in custody.

The trial court stated that a reasonable person sitting in a police car and surrounded by three other officers would feel that his freedom was curtailed. As we said in *People v. Garrison*, 176 Colo. 516, 491 P.2d 971 (1971), however, "the fact that the defendant was asked to sit in a police car does not turn investigation into custody . . . . " 176 Colo. at 519-20, 492 P.2d at 973. Further, in this case, the defendant was asked to sit in *his* police car, which is not a "coercive environment." A reasonable police officer, under these circumstances, would believe that he was simply following the orders of a superior in his place of employment. *See United States v. Goudreau*, 854 F.2d 1097, 1098 (8th Cir. 1988) (police officer, ordered to go to F.B.I.

office and testify in civil rights case, was not in custody for *Miranda* purposes). In *United States v. Dockery*, 736 F.2d 1232 (8th Cir.), *cert. denied*, 105 S. Ct. 197 (1984), the Eighth Circuit found that a bank employee was not in custody when she was ordered, by her employer, to accompany F.B.I. agents to an office as part of an investigation into bank embezzlement. *Id.* at 1235. "Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, [ ] but by the workers' voluntary obligations to their employers." *Id.* at 1234 (quoting *Immigration & Naturalization Serv. v. Delgado*, 104 S. Ct. 1758, 1763 (1984)). A reasonable police officer would not have believed that he could leave the scene of a shooting, which he was involved in, regardless of whether he was a suspect or not. The very fact that Probasco was an on-duty police officer involved in a shooting mandated that he stay on the scene and report to his superiors.

As in *Dockery*, Probasco was "never handcuffed, physically abused, or threatened." 736 F.2d at 1234. In *Dockery*, there was no custody even though the door to the room was shut and the employee was told that she was under investigation. Nor is a defendant's freedom curtailed in a significant way when the police have taken his license and registration, and have asked him to describe an automobile accident. *People v. Black*, 698 P.2d at 768-69.

The question posed here is no different than in *Wallace*, where the police officer approached the defendant at the scene of an automobile accident and asked him "what happened?" 724 P.2d at 674.

In short, there is nothing in the findings of fact that support the trial court's conclusion that a reasonable person in the suspect's position would have believed that his freedom was curtailed in a meaningful way. In *United States v. Hall*, 421 F.2d 540, 545 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970), the court of appeals held that

> in the absence of actual arrest, something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning which indicates that they would not have heeded a request to depart or to allow the suspect to do so.

There is simply nothing in the record, beyond normal employment obligations tied to Probasco's service as Deputy Sheriff, that would support a finding that Probasco was in custody. Probasco does not contend that his statement to his fellow officer was not voluntary. *See People v. Mount*, 784 P.2d 792, 796-97 (Colo. 1990).

Officer Smith also testified that the officers sitting in the car with the defendant were trying to calm him down and telling him that everything would be all right. A reasonable civilian sitting in that police car might have believed that he was in custody, but the reasonable police officer, while on duty, sitting in his police car with fellow officers that were also his friends, would not be likely to believe that his freedom of action was limited in a significant way.

The words spoken to the defendant and the other officers' general tone and demeanor were anything but harsh or threatening. The officer that asked the question testified that the reason he was there was to see if Probasco was all right. There is nothing in the record to

indicate that the officer intended to interrogate Probasco, or that he was even directly involved with the investigation. The one question asked did nothing to lead a reasonable person to believe he was in custody, and the only direction given to defendant was to go back to his car, thereby removing himself from a scene that the record reflected made him very uneasy and distraught. The totality of the circumstances could not, under these unique facts, amount to a finding that there was a custodial interrogation of the defendant.

Miranda's protections were meant to guard against the "compulsion inherent in custodial surroundings." *Miranda*, 384 U.S. at 458. Because a reasonable person in the defendant's circumstances would not have believed that he was in custody, no *Miranda* warnings were required.

As we said in *Milhollin*, a trial court's findings of fact are entitled to deference. "An ultimate conclusion of constitutional law that is inconsistent with or unsupported by evidentiary findings, however, is subject to correction by a reviewing court, ... " 751 P.2d at 50. Here, the trial court's conclusion that Probasco was in custody at the time he made an incriminating statement, and therefore was entitled to *Miranda* warnings, cannot be squared with that court's findings of fact. We conclude, therefore, that this was not a custodial setting, and that Probasco's statements should not have been suppressed.

Accordingly, the order of suppression is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE QUINN dissents and JUSTICE LOHR joins in the dissent.

People v. Probasco, No. 90SA84

JUSTICE QUINN dissenting:

The issue in this interlocutory appeal is whether the defendant's statements to a fellow officer at the scene of a shooting were the product of custodial interrogation. The majority acknowledges that the evidentiary state of the record supports the trial courts finding that the defendant was subjected to interrogation, but then rejects the court's determination that the interrogation was custodial. In my view, the record contains adequate evidence to support the trial court's findings of fact and further demonstrates that the court applied the correct legal standard in resolving the suppression motion. I accordingly dissent.

I.

In ruling on a motion to suppress a custodial statement, a trial court "must engage both in factfinding – a specific inquiry into the historical phenomena of the case – and law application, which involves the application of the controlling legal standard to the facts established by the evidence." *People v. Quezada*, 731 P.2d 730, 732 (Colo. 1987). The correct legal standard in resolving the issue of custodial interrogation is whether "a reasonable person in the suspect's position would consider himself deprived of his freedom of action in a significant way during a police interrogation in which the suspect was exposed to the risk of self-incrimination." *People v. Trujillo*, 784 P.2d 788, 791 (Colo. 1990); *see People v. Cleburn*, 782 P.2d 784,

786 (Colo. 1989); *People v. Thiret*, 685 P.2d 193, 203 (Colo. 1984). In resolving that question the court must consider the totality of circumstances surrounding the interrogation. *Trujillo*, 784 P.2d at 791; *Thiret*, 685 P.2d at 203.

Our role as reviewing court in passing on a suppression ruling is limited to reviewing the record in order to determine "whether the trial court's findings of historical fact are adequately supported by competent evidence and whether the court applied the correct legal standard to these findings in resolving the issue before it." *Trujillo*, 784 P.2d at 792. It is not our function to second-guess the trial court's assessment of the credibility of witnesses or the inferences reasonably drawn by the court in weighing the testimony presented at the suppression hearing.

II.

The record in this case contains competent evidence to support the trial court's determination that the defendant was subject to custodial interrogation at the scene of the shooting. Sergeant Ringo, who was the highest ranking officer at the scene of the shooting and was in charge of the investigation, testified that he instructed Officer Goebel to go with the defendant to the patrol car and stay with the defendant in the car. In response to the question whether the defendant was free to leave the scene at that time, Sergeant Ringo stated that he was not free to leave because, in Sergeant Ringo's view, he "could possibly be a suspect at that time." After Officers Goebel and Wood accompanied the defendant to the patrol car and were waiting there with him, Officer Smith arrived at the scene and, without having advised the defendant of his *Miranda*

rights, questioned him about the circumstances surrounding the shooting. The defendant, who was described by Sergeant Ringo as being "overwhelmed with what was going on," responded in detail to Officer Smith's inquiry while he was seated in the police vehicle in the presence of the three officers.

The trial court's ruling, as evidenced by the following excerpt, refutes any notion that the court did not adequately consider the totality of circumstances in resolving the issue of custodial interrogation or that the court did not apply the correct legal standard in ruling on the suppression motion.

> The totality of the circumstances are, it seems to me, that the defendant was first contacted over the body of the victim under circumstances implicating him in the death of the victim. The officers involved had received information through the dispatcher that there had been a problem on a contact, and certainly the officers responding to the location of the defendant and the victim fully understood that it was something more than a mere traffic problem, that in fact a shot had been fired and heard and the victim and the defendant were together. . . . It's apparent to the Court that the defendant was in a state of some shock but was sufficiently aware of the difficulty of the situation that he stated he didn't want to visit with anybody. That at least suggests that he had some consciousness perhaps of the custodial type arrangement and that he was not free to leave.
>
> * * *
>
> The officer in charge instructed two officers to accompany the defendant back to his car and to stay with him there. I think the words were "until further orders." It's apparent from the

> Sergeant's testimony that subjectively, in . . . law enforcement's mind[,] the defendant was not free to go anywhere. He was free to go back to his car with the accompaniment of law enforcement officers. He was there with two officers. And it's apparent the third officer arrived on the scene as well when this question was given that elicited this long narrative of the occurrence.
>
> [The defendant] was never told that he was not under arrest. He was never told that he was free to leave. There clearly was a lack of *Miranda* advisement. But nothing was conveyed to him in any way that would suggest that his freedom was not restricted in a fairly significant way, namely, he was one officer and he was basically surrounded by two officers and finally a third and then others moved in and out of the area.
>
> It's really difficult for the Court to look at the totality of that situation and to think anything other than a reasonable person in that position would consider himself deprived of his freedom of action in a significant way. I'm not phrasing that too well, but the Court will find that a custodial situation did exist under the totality standard and under the objective standard. And in light of that, it's apparent under the *Miranda* decision and cases similar to *Miranda* there should have been no interrogation without first giving the *Miranda* warning and without securing a voluntary waiver of those *Miranda* rights, and that having failed to give that warning the statements made by the defendant must be suppressed.

It was a prerogative of the trial court in this case, in exercising its factfinding function, to evaluate the evidence and to determine the appropriate weight to be given those aspects of the evidence bearing on the issue of custodial interrogation. Because the district court's

findings are supported by competent evidence in the record, and because the court applied the correct legal standard in resolving the suppression motion, the suppression ruling in this case should be affirmed.

III.

The majority, in reaching a contrary result, places much weight on the fact that the defendant was an on-duty police officer at the time of the interrogation and concludes that "the reasonable police officer, while on duty, sitting in his police car with fellow officers that were also his friends, would not be likely to believe that his freedom of action was limited in a significant way." Maj. op. at 13. The trial court, however, adequately considered the defendant's status as an on-duty police officer and determined that a reasonable person in the defendant's position "would consider himself deprived of his freedom of action in a significant way." Contrary to the majority, I do not view the trial court's ultimate conclusion as inconsistent with or unsupported by its evidentiary findings of fact.

The Supreme Court made it abundantly clear in *Miranda,* however, that the privilege against self incrimination is so fundamental to our constitutional scheme and the expedient of giving a warning as to the availability of the privilege so simple that it is not appropriate "to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda,* 384 U.S. at 468. "[W]hatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures

and to insure that the individual knows he is free to exercise the privilege at that point in time." *Id.* at 469. The fact that the defendant was a police officer, therefore, did not eliminate the need for a proper *Miranda* warning before questioning so long as a reasonable person in the defendant's position would have considered himself significantly deprived of his freedom of action during a police interrogation at the scene of a possibly serious crime in which the defendant obviously was implicated. The trial court's ruling in this case is totally consistent with the principle that in highly stressful situations, such as a custodial interrogation, a suspect's abstract knowledge of his rights well might be less important than his ability to cope with the pressures of the situation. W. White, *Defending Miranda: A Reply to Professor Kaplan*, 39 Vand. L. Rev. 1, 6 (1986). The *Miranda* warnings are calculated to enhance the ability of the suspect, whether a police officer or anyone else, to deal with those pressures by making him aware "not only of the privilege, but also of the consequences of foregoing it." *Miranda*, 384 U.S. at 469.

I would affirm the trial court's suppression ruling because that ruling is supported by competent evidence and is based on the application of the correct legal standard to the factual findings made by the court.

I am authorized to say that JUSTICE LOHR joins in this dissent.

APPENDIX B

DISTRICT COURT, COUNTY OF LOGAN, COLORADO

Case No. 89 CR 96

MOTION OF THE DEFENDANT IN LIMINE TO PROHIBIT THE PEOPLE FROM ATTEMPTING TO INTRODUCE INTO EVIDENCE IN THE CASE IN CHIEF CERTAIN STATEMENTS MADE BY THE DEFENDANT

(Filed Feb. 12, 1990)

PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

DAN PROBASCO,

Defendant.

COMES NOW, the Defendant DAN PROBASCO, by his lawyers, BRUNO, BRUNO & COLIN, P.C., by Louis B. Bruno and Earl S. Wylder, and moves the Court for an entry of an Order prohibiting the People from attempting to introduce into evidence in the case in chief certain statements made by the Defendant shortly after the shooting herein to certain law enforcement officers, and AS GROUNDS FOR SAID MOTION SHOWS THE COURT AS FOLLOWS:

1. That according to the discovery material furnished by the prosecution, the Defendant made the following statements to the following law enforcement officers shortly after the shooting of the deceased, Daniel Eugene Smith:

a. Sergeant Bruce Ringo of the Fort Morgan Police Department stated that, "Dep. Probasco was still on the ground, leaning over the individual and our intention was to have Dep. Probasco move away from the individual so that we could check on the individual. I asked Dep. Dan Probasco to help by moving back and he did this at that moment, Dep. Probasco made a statement. *He stated that he was not going to/ say anything which he repeated twice,* it was clear that Dep. Probasco was shaken by the shooting. I then had enough officers to help Dep. Dan Probasco away from the scene." (Emphasis added).

b. Officer Leon W. Smith of the Fort Morgan Police Department said, "When I arrived at Officer Goebel and Deputy Probasco's location Dan was sitting in a patrol car on the passenger's side in the front seat, facing the open door. Officer Goebel was talking to Dan at this time. At 616 Lincoln I could see Dan's radio and PR24 sitting on the porch. *I asked Dan how his PR24 and radio wound up on the porch.* Dan said that he had contacted the vehicle in the front of his patrol car. When the car stopped, the driver got out of the car and walked up to the house. This house is 616 Lincoln. When Deputy Probasco approached the driver, the driver told him that he could not do anything to him because he was already home. Deputy Probasco then said that the driver shoved him and took off running. Deputy Probasco pointed to the north and said that the driver had ran in that direction. Deputy Probasco then pointed between two houses and said that the driver had ran between those two houses. When Deputy Probasco took off after the driver, he could hear the dogs barking in the alley. Probasco had walked down to 6th and then over to Grant. *Dan said that*

he had found the driver laying in some bushes and said that he had drawn down on the driver and ordered the driver to stay there. The guy started to get up and in doing so, he struck Dan's gun in the barrel area with his head and when this happened the gun went off. The guy fell back down." (Emphasis added).

c. Officer John C. Goebel of the Fort Morgan Police Department said that, "I stayed with Dan at his patrol vehicle and nothing had been said by Dan up to this point. I asked Dan if he wanted to [sit] down and he responded 'yes.' I walked around to the left side of the car, got into the driver's side, leaned across and unlocked the passenger's side door. I then exited the left side and walked around and opened up the door and assisted Dan to his seat. I then knelt down in front of him. I did my best to comfort Dan at that time. I did not ask him any questions whatsoever. Officer Leon Smith was standing to my left leaning up against the patrol car. I don't recall if Officer Smith had asked Dan a question or not, however, Dan did say that the suspect ran up to his house, that being 616 Lincoln Street, was on the porch, Dan followed him at that time. Then the suspect said 'I'm at home now, you son-of-a-bitch, nothing you can do now,' pushed Dan back and Dan pointed north, he said he took off running. Dan chased him to 623 Grant Street where the incident took place. Dan said the suspect was hiding in the bushes, said he drew down on him and ordered him to come out several times, at which time, the suspect did not acknowledge any sign of coming out. *Dan said that he went toward him to assist him and Dan told him to quit struggling. The suspect threw his head back, hit the*

muzzle of Dan's weapon and it discharged, striking the suspect in the head." (Emphasis added).

d. Deputy Bruce Snelson of the Fort Morgan County Sheriff's Department said that he went and sat in the front seat of the patrol car with Deputy Probasco, Probasco was agitated and was trying to be sick so he suggested that they take a walk. The two got out of the car and were walking in the alley next to victim Smith's house. That while walking with Probasco in the alley, Probasco stated words to the effect, "I shot the guy." That he stayed with Probasco until relieved a short time later by his Captain Dana Speaks.

e. Captain Speaks of the Morgan County Sheriff's Department stated that no verbal or written advisements were given to Deputy Probasco at the Fort Morgan Police Department. No questions were asked of him concerning the incident after Deputy Probasco on the advice of his attorney told all officers present that he would not make any statement. However, prior to that time, while in the vicinity of 623 Grant Street, he may have asked Probasco how many shots were fired and Probasco *responded with "only one shot was fired."* Deputy Probasco was confused and asked a lot of questions about his future. He stated that Probasco did explain why he made the traffic stop. Probasco told him that the vehicle was stopped for weaving.

All the statements were made prior to any Miranda advisements and constitute a violation of his right against self-incrimination in that the same were made pursuant to a "custodial interrogation" as the term is defined by

People v. Trujillo, XIV *Brief Times Reporter* 121 (Colo. January 29, 1990).

That if this Motion is not granted, the Defendant will be denied the following constitutional rights:

a. The right not to be compelled to testify against himself in a criminal case as encompassed in the due process clause of the Fourteenth Amendment to the United States Constitution, and Article II, §18 of the Colorado Constitution, relating to self-incrimination.

b. The right to effect assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution pertaining to the right to have the assistance of counsel and the Fourteenth Amendment to the United States Constitution concerning due process, and Article II, §16 of the Colorado Constitution concerning the right to have assistance of counsel, and Article II, §25 of the Colorado Constitution relating to due process.

c. The right to equal protection of law as guaranteed to him by the Fourteenth Amendment to the United States Constitution and Article II, §25 of the Colorado Constitution.

d. The right to enjoy Defendant's life and liberty and to seek his safety and happiness as guaranteed to him by Article II, §3 of the Colorado Constitution.

2. That the probative value of this evidence is substantially outweighed by the damages of unfair prejudice to the Defendant, and pursuant to Rule 403 of the Colorado Rules of Evidence, it should be excluded.

Respectfully submitted,

BRUNO, BRUNO & COLIN, P.C.

/s/ Earl S. Wylder
Louis B. Bruno, No. 3164
Earl S. Wylder, No. 4243
Attorneys for Defendant
143 Union Boulevard, Suite 601
Lakewood, Colorado 80228
Telephone: (303) 988-1951

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of February, 1990, I caused to be delivered a true copy of the within Motion of the Defendant in Limine to Prohibit the People From Attempting to Introduce Into Evidence in the Case in Chief Certain Statements Made by the Defendant by placing the same in the U.S. Mails with sufficient postage and forwarding the same to:

Jon M. Bailey
District Attorney
Thirteenth Judicial District
P.O. Box 1337
Fort Morgan, CO 80701

/s/ Earl S. Wylder

APPENDIX C

DISTRICT COURT, LOGAN COUNTY, COLORADO
Case No. 89CR96

ORDER
(Filed Feb. 21, 1990)

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

DANIEL JAY PROBASCO,

Defendant.

The following Order was issued on Tuesday, February 20, 1990, by the HONORABLE JAMES R. LEH, Judge of the District Court.

APPEARANCES:

For the People:	Jon Bailey, Esq. District Attorney
For the Defendant:	Earl Wylder, Esq. Louis Bruno, Esq. Attorneys at Law

WHEREUPON, the following proceedings were had and entered of record, to-wit:

THE COURT: You maybe seated.

The Court has been struggling primarily with the issue of custody. It seems to me that under the *Lowe* case

and under *Rhoade [sic] Island vs. Innis* the standards there concerning interrogation relate to questions that are not "express questions" but are questions which are likely to elicit an incriminating response. In the *Lowe* case I think the question was "do you know why you're here." And so they have to go through that kind of an analysis. The *Lowe* case goes into all kinds of discussion that the Judge should not pay any attention to the subjective state of the questioner, and then proceeds to quote the detective who asked the question who said, "Well, I wasn't going to give the advisement until he answered my questions." So it's pretty obvious what his intent was, however irrelevant that may have been.

But it seems to me we had a direct question here. They may as well just said, well, tell us what happened. And so there isn't any question in my mind but what we had an interrogation. What the subjective intent of the officer was at the time I think is irrelevant. The focus, at least according to the *Lowe* case and I think *Rhoade [sic] Island vs. Innis,* is pretty much on the subjective state of the defendant at that point. It's fairly apparent that the defendant certainly responded in a way to demonstrate he thought they wanted him or the questioner was asking him what happened and proceeded to respond accordingly.

The problem then gets into the whole custody issue. And as counsel point out, the *Trujillo* case, the *Hopkins* case which is cited in *Trujillo,* and others, requires the Court to ask whether a reasonable person in the suspect's position would have considered himself deprived of his freedom of action in a significant way during this interrogation. The totality of the circumstances are, it seems to

me, that the defendant was first contacted over the body of the victim under circumstances implicating him in the death of the victim. The officers involved had received information through the dispatcher that there had been a problem on a contact, and certainly the officers responding to the location of the defendant and the victim fully understood that it was something more than a mere traffic problem, that in fact a shot had been fired and heard and the victim and the defendant were together.

The subjective understanding of the defendant, while not controlling, I think is still somewhat relevant. And I suppose maybe that's what they're saying also in the *Lowe* case, namely some of the subjective elements may be relevant to applying the objective standard. It's apparent to the Court that the defendant was in a state of some shock but was sufficiently aware of the difficulty of the situation that he stated he didn't want to visit with anybody. That at least suggests that he had some consciousness perhaps of a custodial type arrangement and that he was not free to leave.

If he had been told by the officer in charge to go on back to his car and wait there and they would be back and visit with him a little bit later if that was okay with him or something of that nature where there were some words to suggest that he was free to stay there or take off as he chose, that might have been something to suggest that there was no custodial situation involved and the officers were just basically trying to sort the players out and go through a breakdown in investigation to see what had happened and what have you, namely, sort of a *Stone* stop type situation. That isn't what happened.

The officer in charge instructed two officers to accompany the defendant back to his car and to stay with him there. I think the words were "until further orders." It's apparent from the Sergeant's testimony that subjectively, in the police, law enforcement's mind the defendant was not free to go anywhere. He was free to go back to his car with the accompaniment of law enforcement officers. He was there with two officers. And it's apparent the third officer arrived on the scene as well when this question was given that elicited this long narrative of the occurrence.

He was never told that he was not under arrest. He was never told that he was free to leave. There clearly was a lack of *Miranda* advisement. But nothing was conveyed to him in any way that would suggest that his freedom was not restricted in a fairly significant way, namely, he was one officer and he was basically surrounded by two officers and finally a third and then others moved in and out of the area.

It's really difficult for the Court to look at the totality of that situation and to think anything other than a reasonable person in that position would consider himself deprived of his freedom of action in a significant way. I'm not phrasing that too well, but the Court will find that a custodial situation did exist under the totality standard and under the objective standard. And in light of that, it's apparent under the *Miranda* decision and cases similar to *Miranda* there should have been no interrogation without first giving the *Miranda* warning and without securing a voluntary waiver of those *Miranda* rights, and that having failed to give that warning the statements made by the defendant must be suppressed.

Insofar as the earlier statement is concerned, I don't think there's any question but what that statement would have to be suppressed in any event, that is the statement that he wasn't going to talk to anybody. Clearly an exercise of one's constitutional right couldn't be used in anyway to incriminate him in any event, and the case law I think is overwhelming on that point.

Insofar as the other questioning that occurred followed by or I should say that followed the question by Officer Smith, I think it's fairly apparent that that all occurred within certainly a time frame and within a proximity that's tainted by the failure to give the *Miranda* warning. And as counsel indicates, the fruit of the poisonous tree would dictate, the cases concerning fruit of the poisonous tree would dictate that those questions and answers and comments should also be suppressed.

That will be order of the Court.

Dated this 21st day of February, 1990.

BY THE COURT:

/s/ James R. Leh
James R. Leh, District Judge